U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

DATE: AUG 0 1 2013 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a semiconductor manufacturer. It seeks to employ the beneficiary permanently in the United States as a market researcher. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary possessed the minimum level of education stated on the labor certification and as required for classification as an advanced degree professional.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the the Immigration and Nationality Act (the Act) provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on August 15, 2012.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on November 5, 2012. In evaluating the beneficiary's qualifications, the United States Citizenship and Immigration Service (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in marketing, economics, finance, political science, or other related business or science.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's degree and three (3) years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months experience as a project manager/senior director, account executive, or associate project director.
H.14. Specific skills or other requirements: Education or experience in market research methodology – qualitative and quantitative research; statistical modeling – including conjoint analysis, segmentation and predictive modeling; questionnaire/discussion guide design and report development; and marketing campaign communications – including message writing and message architecture creation. Employer will accept any suitable combination of

education, training or experience.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[3] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty) as of the priority date. 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty) as of the priority date. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by

[3] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

In the instant case, the labor certification states that the beneficiary possesses a bachelor's degree in philosophy, politics and economics from [redacted] completed in 2004. In regards to the beneficiary's education, the petitioner submitted a letter dated April 26, 2012 from the College Secretary and Registrar of [redacted] stating that the [redacted] does not issue transcripts for students who matriculated before [redacted] term 2007. The letter states:

> [The beneficiary] – [date of birth], Bachelor of Arts in Philosophy, Politics and Economics, was an undergraduate member of this college, reading as a full-time student for the above degree of the [redacted] The course commenced in October 2001 and was completed in June 2004. In July 2004, [the beneficiary] was awarded an Upper Second in the final examinations for the Honour School of Philosophy, Politics and Economics and is entitled to have the degree of Bachelor of Arts conferred on him.

The letter also describes the beneficiary's course work and the grades received.[4] Therefore, this letter states that, as of April 26, 2012, the [redacted] had not conferred a degree to the beneficiary.

The petitioner also submitted an educational evaluation dated August 4, 2011 from [redacted] for the [redacted] states in her evaluation that she received a "To whom it may concern" letter from the [redacted] dated March 23, 2001, which listed "subjects examined including the marks for each," and based on that letter alone, determined that the beneficiary has the equivalent of a bachelor's degree in philosophy, politics and economics from a regionally accredited college or university in the United States. However, while the beneficiary may possess the "equivalent" level of education to a bachelor's degree, [redacted] evaluation does not indicate that the beneficiary has had any degree conferred. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

[4] The record of proceeding contains an identical letter dated March 25, 2011, from the then Secretary and Registrar.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The director issued a request for evidence (RFE) on November 9, 2012, requesting that the petitioner submit evidence that the beneficiary possessed the required degree as of the priority date in 2012. In response, counsel for the petitioner asserts "[the beneficiary] has completed the degree of Bachelor of Arts in Philosophy, Politics and Economics, and has all the rights and privileges to the degree, however, he merely has not had the conferral of the certificate that commemorates the degree's award." Counsel also submits a letter dated November 27, 2012 from the Director of the writes that he supervised the beneficiary's degree completion and states that the beneficiary has the rights and privileges of the degree but has not had the certificate to commemorate the degree conferred.[5] The Director of adds "I understand [the beneficiary] has deferred receiving the certificate while working in the United States because he wishes to attend a formal degree ceremony at

On appeal, counsel asserts that the beneficiary is qualified for the classification requested and the position offered because he completed the degree requirements and is entitled to a bachelor's degree. Counsel states that the beneficiary has completed the academic requirements making him eligible and entitled to have a degree conferred upon him and that he has merely not had the ceremonial certificate issued. However, the evidence in the record is insufficient to establish that the beneficiary had been awarded a U.S. bachelor's degree or foreign equivalent degree by the priority date of the instant case. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C) and *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977)

On appeal counsel further submits a letter dated March 18, 2013 from the Deputy Registrar of the . The letter is entitled "Degree Confirmation" and states "this is to certify that the student named below has satisfied all the requirements for the award of the degree indicated below;" however, the letter then goes on to state "this student has been awarded the degree listed above by the The student is unable to provide the original certificate of award because it has not yet been issued." The letter is internally inconsistent and does not establish that the beneficiary has been awarded a degree. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile

[5] According to the record of proceeding, the beneficiary completed his coursework at There is no indication that the beneficiary took courses or studied at the Therefore, it is unclear in what capacity the Director of supervised the beneficiary's degree completion.

such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On June 26, 2013, the AAO additionally received correspondence from counsel indicating that the beneficiary had received his degree certificate from and that it was attached. The accompanying certificate bears the title ' ' and states "This is to certify that [the beneficiary], satisfied the Examiners in the Final Honour School of Philosophy, Politics and Economics on 12 July 2004, and was placed by them in the Second Class, Division One and, having satisfied all the conditions prescribed by the Statutes of the University, was on 18 May 2013 admitted to the Degree of Bachelor of Arts." The priority date of the instant petition is August 15, 2012. The beneficiary's degree was awarded on May 18, 2013, which is after the priority date of the instant case. Therefore, the beneficiary did not possess the required education at the time of the priority date.[6]

The petitioner failed to establish that the beneficiary possessed an advanced degree by the priority date as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[6] The degree was provided after the denial and after the time established for filing an appeal. The degree appears to be a photocopy or enlargement and appears to be missing identifying and authenticating information due to copying or enlarging. Therefore, the petitioner should provide a complete, legible copy in any future filings.